FORM NLRB-4477

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(San Francisco, California)

LOMAN ENTERPRISES, INC. d/b/a
CASTAGNOLAS RESTAURANT **1/**

Employer

and

ROBERTO YANEZ, An Individual

Petitioner

and

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES
UNION, LOCAL 2, AFL-CIO

Union

20-RD-2326 **DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer. 3/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act. 4/

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: 5/

All employees of the Employer working within the jurisdiction of the Hotel Employees & Restaurant Employees Union, Local 2, AFL-CIO ('the Union") as covered under the most recent Memorandum of Understanding between the Employer and the Union, effective June 1, 1997, to and including April 31, 2000; excluding all managerial employees, guards and supervisors 6/ as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit*(s)* who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

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period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Hotel Employees & Restaurant Employees Union, Local 2, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before December 10, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by December 17, 2002.

Dated: December 3, 2002

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

1/ The Employer's name appears as amended at the hearing.

2/ The hearing in this case closed on June 21, 2002, and was reopened pursuant to my September 6 and 13 orders, which remanded and rescheduled this case for further hearing. The record is comprised of the transcripts and exhibits from the hearing held on June 21, and September 27, 2002.

3/ The record reflects that the Employer is engaged in the business of operating a restaurant in San Francisco, California. The parties stipulated, and I find, that during the twelve month period ending June 21, 2002, the Employer generated revenue in excess of $500,000, and during the same twelve month period purchased goods valued in excess of $5,000 from sources outside the State of California. Based on the foregoing evidence and the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3/ The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

4/ No party contends that there is a contract bar to this proceeding.

5/ The basis for the unit description is set forth below. In addition, the eligibility of certain seasonal and/or student employees is also addressed below.

The Unit. The decertification petition herein was filed in a unit comprised of cooks, food servers, busers, porters, dishwashers and bartenders employed by the Employer at its San Francisco, California facility; and excluding managers and supervisors.

Although the parties do not dispute the unit description in this case, an explanation is in order regarding the unit herein found appropriate. It is well settled that the unit appropriate in a decertification election must be coextensive with the certified or recognized unit. *Campbell's Soup Co*., 111 NLRB 234 (1955). The parties herein have stipulated that a document entitled Memorandum of Understanding (the MOU), effective June 1, 1997, to and including April 31, 2000, is the most recent collective bargaining agreement between the parties. The MOU contains no unit description. The parties also stipulated into the record a document entitled Independent Restaurant and Tavern Agreement, (herein called the Master Agreement) effective September 1, 1987 to August 31, 1990, which was a master multi-employer agreement covering employees of the Employer. The only other agreements in the record are two memoranda of understanding that predate the Master Agreement.

The recognition clause of the Master Agreement states that the Union shall be recognized as the sole bargaining agency for all employees employed by the Employer coming under the jurisdiction of the Union. The section of the Agreement covering classifications and wage rates contains a lengthy list of classifications, which vary depending on the nature of an employer's operations, and which include: chefs/head cooks, second cooks/1st pantry cooks; cooks, night cooks, 1st pantry persons, pantry employees, fish butchers, Hofbrau Carvers, griddle cooks, managers working in the trade, head waiters, head waitresses, or man or women in charge of departments, captains, host persons, cashiers, checkers, cashiers/checkers, servers, bus persons, waiters, waitresses, banquet servers, carvers, salad or sandwich persons, supply persons, buspersons/dishwashers, storeroom persons, crab or outside stand persons, office clerical employees, dishup employees, salad/sandwich assemblers, food checkers, cashiers/food checkers, head bartenders, cage bartenders, bartenders, dishwashers/vegetable persons/porters, dishwashers/bus persons, door persons, night porters, assistant managers, night managers or head fountain persons, service bar persons, bar persons/porters, hat checkers, cloak room attendants, room attendants and cigarette persons, parlor maids and restroom attendants.

At the hearing in this case held on June 21, 2002, the parties stipulated that the unit covered under the MOU was comprised of:

> All food and beverage employees, including food servers, bus persons, porters, night porters, dishwashers, pantry workers, cooks, bartenders, hosts, and hostesses; and excluding, office clerical employees, guards and supervisors as defined in the Act.

At the hearing in this case on September 27, 2002, the parties stipulated that the only classifications included in the Master Agreement that were employed by the Employer at the time of the hearing were the following classifications, which they stipulated are to be included in the unit herein found appropriate: hosts/hostesses, buspersons, servers, dishwashers, night porters, bartenders and cooks. The parties also stipulated to a list of named employees and their classifications that were actually employed by the Employer at the time of the hearing and who were covered under the MOU. Although the parties' stipulations on June 21 and September 27 differ in that the September 27 stipulation did not include porters and pantry workers, this may be explained by the fact that the Employer did not employ anyone in these classifications at the time of the hearing on September 27. The parties have further stipulated to the exclusion of office clericals, guards and supervisors as defined in the Act.

The parties do not appear to dispute that the Employer would recognize the Union as the representative of any employee employed within the classifications included in

the unit as set forth in the Master Agreement. Accordingly, while it is apparent that only certain of the classifications covered under the MOU and the Master Agreement were employed by the Employer at the time of the hearing in this case, under the applicable legal principle, as set forth above, I am compelled to describe the unit herein based on the recognized unit as covered under the MOU.

The Seasonal and/or Student Employees. The parties do not dispute that casual seasonal employees should be excluded from the unit but there is no agreement on which of the Employer's seasonal employees are regular seasonal employees and which are casual or temporary seasonal employees. They stipulated to the inclusion in the record of a list of employees employed at the restaurant as of August 22, 2002. This list includes the names of six seasonal employees, Hostess Jelena Belova, Server Alena Kanskikh, Host Paul Lew, Server Lili Monvoisin, Bartender Tim Rooney and Server Peter Van Des Zwan. It also contains the names of six student employees, including Deck Employee Brett Amory, Busperson T. Selmeg Garmaa, Dishwasher Rizky Fitria Hakini, Bartender Jerry McLellan, Busperson Sean McTiernan and Busperson Stephen Fowler.

Applicable Legal Principles Regarding Seasonal Employees and Student Employees: The test of whether an employee is a regular seasonal employee who should be included in the bargaining unit or a casual or temporary seasonal employee who should be excluded is whether he or she has a reasonable expectation of reemployment in the foreseeable future. *L. & B. Cooling,*, *Inc.,*267 NLRB 258 (1959). Temporary or casual seasonable employees will be excluded from the unit. *L & B Cooling, supra*. Factors that the Board examines to determine whether an employee is a regular seasonal employee are: (1) whether the employer draws from the same labor force each season; (2) whether former employees are given preference in rehire or recall or whether the employer uses a preferential hiring list; (3) whether the duties, working conditions, supervision and benefits are substantially similar for both the permanent and seasonal employees; and (4) the ability to go from a seasonal to permanent employment. See L & B. Cooling, Inc., supra; *Maine Apple Growers, Inc*., 254 NLRB 501, 503 (1981); *Bogus Basin Recreation Association*, 212 NLRB 833 (1974). As discussed below, similar factors are considered to determine whether students hired for the summer are eligible to vote as regular employees.

The Employer's Operation. The Employer's busy season begins around June 1 of each year and ends in mid-October. The Employer does not advertise for seasonal employees but instead they come to the Employer seeking work. Many students from all over the world apply for work with the Employer in the summer. The Employer does not expressly inform these new hires that they are going to be laid off at the end of the busy summer season. Nor does it promise them continued employment when

they are hired for the summer or tell them that they will be recalled in subsequent seasons if their performance is acceptable. However, according to General Manager Creighton, it is a matter of common knowledge among the students, many of whom intend to leave to return to school in their own country in the fall. The average amount of time that a summer employee works for the Employer is about four or five months. When seasonal employees are terminated at the end of the busy season, they are told by General Manager Creighton that there is no more work for them. Although they are not specifically promised that they will be recalled to work, Creighton does inform them that the earliest they would be recalled if business picked up is in April or May. The Employer does not maintain a list of employees that it utilizes in order to call back the same seasonal employees it has used in prior years. The employees hired during the busy summer season perform the same functions and have the same supervisors as do permanent employees and they earn the same starting wage rate. Pursuant to the Agreement, these employees are eligible for benefits after they have worked for the Employer for over four months, the same requirement applied to all other employees. Only one of the allegedly seasonal employees, Tim Rooney, had been employed for four months at the time of the hearing.

In the 2001 season, the Employer hired 12 to 15 summer employees and only one of them, Selmeg Garmaa, returned to work in the 2002 summer season. In the 2002 summer season, the Employer hired about 20 seasonal/student employees. By the time of the hearing in this case, the Employer had laid off approximately eight of these summer employees. The parties stipulated into the record a list of six seasonal employees and six student employees who were still working as of August 22, 2002.

Some of the seasonal employees are hired to work in the Employer's deck area. The deck is an upstairs area of the Employer's restaurant where the Employer holds banquets. It is comprised of a large enclosed area which is surrounded by an outdoor deck area. Deck employees include bartenders, servers and bus persons. In the past, the deck has been closed by the Employer in the winter during the rainy season when business slows down. Creighton testified that as of the hearing date in late September, 2002, he had not decided to close the deck.

Hostess Jelena Belova. Belova was hired on July 26, 2002, and works as a hostess four days a week in the downstairs portion of the restaurant. Creighton testified that she will not be terminated at the end of the busy season unless her work is unsatisfactory because there is a position for her to fill. However, at the time of the hearing, Creighton had not informed Belova that she would be kept on after the summer season ended.

Server Alena Kanskikh. Kanskikh was hired by the Employer on May 21, 2002. Creighton testified that there was a good chance that Kanskikh would be kept on but that she could be laid off or her hours cut back substantially depending on business.

Host Paul Lew. Lew was hired on May 16, 2002. He is a host who works part-time, three shifts a week (i.e., 18 to 24 hours a week). According to Creighton, Lew will be retained at the end of the busy season. As of the date of the hearing, Creighton had not informed Lew that he would be kept on after the busy season ended.

Deck Manager/Bartender/Server/Waiter Tim Rooney. Rooney was hired as a bartender on April 4, 2002. At the time of the hearing, Rooney was working as deck manager/bartender/server/waiter. Creighton testified that about mid-summer, 2002, he informed Rooney that the Employer would continue to employ him after the busy season. According to Creighton, Rooney will be kept on by the restaurant after the end of the busy season and will work downstairs as a bartender.

As deck manager, Rooney oversees what is going on the deck. He has authority to counsel employees if they are doing something wrong. However, before he does so, Rooney must consult with Creighton and Creighton decides whether Rooney or Creighton will handle counseling an employee. Creighton testified that Rooney had fired an employee who was constantly late for work. Creighton and Rooney had together spoken to this employee three times about this tardiness problem prior to his being terminated. On the day when the employee was terminated, he showed up for work 45 minutes late for his shift, at a time when the Employer was very busy, and Rooney fired him on the spot without first talking to Creighton.

Rooney also makes out the schedules for deck employees. Creighton reviews the schedules made out by Rooney and has made changes in them. If an employee who works on the deck wants a day off or to switch a shift, they ask Rooney, who in turn consults with Creighton. Rooney earns $14 an hour and the other bartenders earn between $10 and $12 an hour. Creighton testified that Rooney is paid more money because "he's managing the upstairs."

Analysis. Based on the foregoing, the record shows that, while the Employer has a seasonal operation and hires a substantial number of its workforce to work during the busy summer/fall season: it does not rehire seasonal employees on a regular basis; it does not promise them that they will be rehired; and, virtually none of them are rehired. However, General Manager Creighton testified that if a seasonal employee was available when business picked up again after the busy season, he or she could be recalled by the Employer. Accordingly, none of the employees who had been laid off at the time of the hearing are eligible to vote as regular seasonal employees.

With regard to the specific employees discussed in the record, the record establishes that Belova and Lew perform work in bargaining unit classifications and have common supervision and similar pay rates as do other permanent employees. Moreover, the testimony indicates that they will be kept on indefinitely after the busy season ends. Therefore, I find that they are not temporary seasonal employees but, rather, regular part-time employees. Accordingly, they are eligible to vote in the

election so long as they are still employed as of the eligibility date. With regard to Kanskikh, she also performs bargaining unit work and has common supervision and the same pay rate as other unit employees. As the Employer is uncertain as to whether she will be laid off and, in fact, has presented evidence to the effect that there is a "good chance" that she will not be laid off, I find that she is also a regular part-time employee and not a temporary employee and that she should be included in the unit so long as she has not been terminated as of the eligibility date. With regard to Rooney, I find that he has a reasonable expectation of permanent employment with the Employer and he will not be excluded from the unit as a temporary seasonal employee. However, as addressed below, the evidence raises an issue as to his supervisory status that warrants his voting subject to challenge.

Student Employees. As indicated above, in determining whether student employees share a sufficient community of interest with other unit employees to be included in the unit, the Board applies legal principles similar to those applied to other seasonal employees. Thus, where summer students are hired to fill seasonal vacancies, do not enjoy the same fringe benefits, and have no commitment for rehire during subsequent summers, they are held to be temporary employees and excluded from the unit. *Fisher Controls Co*., 192 NLRB 514 (1971); *Walgreen Louisiana Co., Inc,* 186 NLRB 129, 130 (1970); *Hygeia Coca-Cola Bottling Co*., 192 NLRB 1127 (1971); *Georgia-Pacific Corp*., 201 NLRB 831 (1973).
However, although the Board generally excludes students who are employed only in the summer from an appropriate unit, they may nonetheless be deemed eligible to vote if, upon returning to school, their employment evidences regular part-time status. *Crest Wine & Spirits, Ltd*., 168 NLRB 754 (1968); *Beverly Enterprises Massachusetts, Inc. d/b/a Beverly Manor Nursing Home,* 310 NLRB 538 fn. 3 (1993).

The record reflects that the Employer treats other seasonal employees and student seasonal employees in the same manner. That is, the Employer does not promise them continuing employment beyond the summer nor does it promise to recall them when the season ends. The Employer does not maintain a preferential hiring list and generally does not rehire summer employees. Creighton does tell employees when they are laid off, that the earliest the employer would recall them was April or May or whenever business picked up again. Of the six student employees listed in the record, only one had previously worked for the Employer and he had approached the Employer and not been contacted by the Employer for rehire. The student employees perform similar work for similar pay as do permanent employees employed by the Employer.

The employees listed as student employees on the exhibit stipulated into the record by the parties includes the names of six individuals, Brett Armory, Selmeg Garmaa, Jerry McLellan, Sean McTiernan, Stephen Fowler and Rizky Fitria Hakini. The record evidence regarding each of these individuals is set forth below:

Brett Armory. Armory works as a busperson on the deck on the weekends. Creighton testified that Armory will be laid off when the deck closes.

Selmeg Garmaa. Garmaa was hired as a busperson on July 10, 2002. According to Creighton, Garmaa's home is in Mongolia and Garmaa told the Employer when he was hired that he would be leaving his job in December, 2002. Creighton testified that Garmaa is the only seasonal/student employee who was employed during a previous summer season but he was not recalled by the Employer in 2002 but instead just showed up for work again and was hired.

Bartender Jerry McLellan. McLellan is a student who was employed part-time at on Fridays, Saturdays and Sundays as a bartender. Creighton testified that McLellan will be laid off when the upper (outside) deck is closed for the winter.

Busperson Sean McTiernan. McTiernan works as a busperson in the downstairs portion of the restaurant. He works four shifts a week. He is a student studying to be a fireman and paramedic. According to Creighton, whether McTiernan is retained by the Employer depends on how much business slows down during the rainy winter season.

Busperson Stephen Fowler. Creighton testified that Fowler is not a student and he works full-time as a busperson. According to Creighton, the Employer may retain Fowler to work downstairs in a permanent position when a couple of students who are working there leave. These students were not identified in the record.

Rizky Fitria Hakini. Creighton testified that Dishwasher Rizky Fitria Hakini is not a student/seasonal employee but a full time dishwasher. Creighton testified that as long as his performance is acceptable, Hakini will be retained by the Employer.

In addition to the foregoing students, Employer witness Creighton testified that there were two or three student teacher employees, including Hostess Mario Bisio, who would only be with the Employer for six weeks to two months and then were returning to their universities to student teach.

Analysis. Applying the foregoing legal principles, I find that Fowler and Hakini are not temporary seasonal employees but full-time employees who work in classifications included in the unit and who have common supervision with other unit employees. Accordingly, they are eligible to vote so long as they have not been terminated prior to the eligibility date.

Based on the Employer's evidence that it will terminate Armory and McLellan as soon as its deck closes, I find that both employees are temporary seasonal/student employees who are not eligible to vote in the election. As indicated above, there is no evidence that the Employer has a practice of recalling seasonal employees and

there is no evidence that Armory has been promised that he will be retained. With regard to McTiernan, because the Employer is unsure as to whether he will be laid off at the end of the busy season, I find that he is eligible to vote. Finally, it is concluded that Garmaa is eligible to vote as his termination date appears dependent on his own decision of when to leave his job and not on the Employer's decision to lay him off at the end of the summer season. It is further noted that Garmaa is the only employee in this group who had worked for the Employer in the prior season. Although he was not recalled by the Employer to work during the 2002 season, this fact does tend to show that he has a community of interest with the regular unit employees. Accordingly, if he is still employed by the Employer during the relevant eligibility period, he will be allowed to vote in the election.

6/ The Union contends that employees Lionel Hornsby, Helen Chang and William Perez must be excluded from the unit because of their express exclusion under the MOU based on their status as statutory supervisors and/or managerial employees. The Employer takes the position that none of these individuals have been statutory supervisors and/or managers for the past couple of years and they should be included in the unit. The Union also seeks the exclusion of Hostess Marsha Bach and Chef Tak Wok as managerial employees and/or statutory supervisors and the Employer takes the opposite position.

Stipulation. The parties stipulated, and I find, that Manager John Creighton, Bookkeeper Lynn Hartman and Kitchen Manager Quito Karpinski are excluded from the unit as statutory supervisors and/or managerial employees.

The MOU referred to in footnote 5 above states as follows:

> 3. The Employer shall have the right to the following management positions who are not covered by the terms of this Agreement, who may perform bargaining unit work provided they do not displace current employment positions: Cashier/Host Manager, Lionel Hornsby; Chef, Anser Fajardo; Head Bartender, Louis Comisso; Bookkeeper, Flavio Flores; Office Manager; Rosemarie Delena; Deck Manager, William Perez; and Floor Manager, Helen Chang. It is expressly understood that Ms. Chang as a manager, cannot use her authority to assign herself the preferable shifts, stations and/or customer seating. Ms. Chang will perform non-bargaining unit management functions more than 50% of the time.

For approximately 25 years prior to the spring of 2001, the Employer had been operated by Owner Andrew Lolli. The Employer's operations changed and were substantially reduced beginning in March, 2001, when it closed for a little over a

month and then re-opened because of Lolli leaving the business. Prior to the closure, the Employer had been a seven-day a week operation that served breakfast, lunch and dinner. The number of employees had ranged from 30 to 35 in the winter to about 50 during the summer months. When it reopened in April, 2001, it employed approximately 25 to 30 employees, operated only five days a week, and no longer served breakfast. It was not until May 19, 2002, that the Employer resumed operating seven days a week.

General Manager John Creighton, who has been the Employer's general manager since April 15, 2002, is responsible for: running the restaurant; handling the hiring and firing of employees; disciplining employees; and, training and scheduling employees. The only other individual with any authority over employees is Amy Lolli, the wife of Andrew Lolli, who also manages the Employer. Creighton testified that he spends about 60 to 80 hours a week at the restaurant and Lolli is present about 50 to 60 hours a week. If both of them are absent from the premises, the procedure is for employees to call them and ask for instructions. If customers have concerns when both Creighton and Lolli are unavailable, they consult with the host or bartender. The host has the authority to excuse customers from paying their bill if they are not satisfied with their meal. The porters and/or the bartender are responsible for gathering up the money and putting it in the safe and for locking up the building at night. Creighton, the bookkeeper and Lolli are the only persons who know how to unlock the safe and are responsible for picking up the money the next day. As indicated above, the parties have stipulated to the exclusion from the unit of Creighton and the bookkeeper as statutory supervisors and/or managerial employees.

Creighton testified that among the staff changes that took place in the spring of 2001, the Employer eliminated the position of deck manager, which was formerly held by William Perez, and the position of floor manager, which had been held by Helen Chang.

William Perez. Perez had been a deck manager prior to the Employer's closure in 2001. He left his job with the Employer prior to the closure in the spring 2001, and was rehired by the Employer about eight or nine months before the hearing. At the time of the hearing, Perez was a part-time waiter working approximately 20 hours a week. According to Creighton, Perez has no authority to hire or fire, direct or schedule employees or to authorize overtime; nor does he handle grievances or attend supervisory meetings.

Helen Chang. The record shows that, at the time of the hearing, Helen Chang was a full-time waitress with no authority to hire, fire, discipline or promote employees or to recommend such actions by the Employer; nor does she

schedule or have any other authority over other employees or grant time off, authorize overtime, handle grievances or attend supervisory meetings.

Lionel Hornsby. The Union contends that Hornsby should be excluded as a supervisor and/or manager because of his exclusion under the terms of the MOU. The Employer takes the position that Hornsby had not, in fact, been a supervisor or manager for a couple of years prior to the hearing in this case.

Hornsby has been employed by the Employer for approximately 15 years. At the time of the hearing, he was a part-time bartender and a host. According to Creighton, the Employer has several hosts and they all perform the same functions, which include seating guests at their tables and directing waiters to handle different sections of the restaurant. In this regard, Creighton testified that the host knows the abilities of the waiters on the staff and assigns tables to them accordingly. Hosts, including Hornsby, are also expected to report improper conduct or tardiness to Creighton. According to Creighton, Hornsby has no authority to hire, fire, discipline, evaluate, adjust grievances or schedule employees. Creighton testified that, if an employee wanted a day off, he or she would have to go to Creighton to request it. Employees fill in their own hours on time sheets and Hornsby keeps these time sheets at his work station. He has no authority to change the pay rates of employees. Hornsby does not receive different benefits from other employees. Nor does he attend supervisory meetings.

Hostess Marsha Bach The Union seeks the exclusion of Hostess Marsha Bach as a manager or statutory supervisor. The Employer takes the position that she has not been a statutory supervisor or manager since Creighton took over as manager. Bach has worked for the Employer for 35 years. At the time of the hearing, she was working part-time as a hostess. Prior to Creighton taking over as manager, Bach had the authority to hire employees, but the record reflects that she no longer makes any hiring recommendations. While she gives Creighton the information that he needs to schedule employees, he is the one who does the scheduling, not Bach. Bach earns $12 dollars an hour, and newly-hired hostesses earn $10 an hour. Bach has a parking space next to the restaurant, which is a benefit that is apparently not given to other employees.

Chef Tak Wok At the first day of hearing in this case, the parties disputed whether Wok was a statutory supervisor and/or manager and evidence was taken on this issue. However, at the second day of the hearing, the Employer represented that Wok had been terminated and been replaced by Kitchen Manager Quito Karpinski, whom the parties have stipulated is a statutory supervisor and/or manager excluded from the unit.

Deck Manager/Bartender/Server/Waiter Tim Rooney. As indicated above, the evidence regarding Rooney raises an issue as to whether he is a statutory supervisor because of his involvement in firing an employee and his role in scheduling. However, as the evidence is inadequate to determine his status in this regard, he will be allowed to vote subject to challenge. I find no evidence that Rooney is a managerial employee.

Legal Principles Regarding Managerial Employees. Managerial employees are defined as those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 288 (1974), quoting *Palace Laundry Dry Cleaning*, 75 NLRB 320, 323 n. 4 (1947). "Managerial employees must exercise discretion within or even independent of established employer policy and must be aligned with management." *NLRB v. Yeshiva University*, 444 U.S. 672, 103 LRRM 2526, 2531 (1980). As the Supreme Court stated in *Yeshiva*, *supra*, "Normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id*.

In the instant case, I find no evidence to show that Perez, Chang, Hornsby, Bach or Wok is a managerial employee. Furthermore, I find that the fact that the MOU expressly excludes them from the unit by name or by classification *when they occupy managerial positions*, this does not require that they be excluded from the unit now that they no longer possess managerial authority and are performing unit work.

Applicable Principles Regarding Supervisory Status. In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *International Center for Integrative Studies*, 297 NLRB 601 (1990); *Juniper Industries, Inc.,* 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp*., 308 NLRB 555 (1992); *Bowne of Houston, Inc*., 280 NLRB 1222, 1223 (1986). An individual who exercises some "supervisory authority" only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id*. Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp*., 254 NLRB 433, 347 (1981). Secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an employee is a statutory supervisor. *Laborers Local 341 v. NLRB, supra; Arizona Public*

Service Co. v. NLRB, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971*); Waterbed World*, 286 NLRB 425, 426 (1987).

Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB,* 445 F.2d 237, 243 (D.C. Cir. 1971). It is well established that mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Sears, Roebuck & Co.,* 304 NLRB 193 (1991). Although a supervisor may have "potential powers . . .theoretical or paper power will not suffice. Tables of organization and job descriptions to do not vest powers." *Oil Workers v. NLRB, supra*, at 243. In addition, the evidence must show that the alleged supervisor knew of his or her authority to exercise such power. *NLRB v. Tio Pepe, Inc*., 629 F.2d 964, 969 (4th Cir. 1980).
Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.,* 308 NLRB 101 (1992); *California Beverage Co*., 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

In the instant case, I find insufficient evidence to establish that Perez, Chang or Bach are statutory supervisors. With regard to Hornsby, because of certain evidence regarding his ability to assign work to employees based on his judgment as to employees' abilities, I find that an issue is raised as to his supervisory status. However, the evidence is insufficient to determine his supervisory status. Accordingly, he will be allowed to vote subject to challenge. With regard to Deck Manager Rooney, I find no evidence to show that Rooney is a managerial employee. However, as indicated above, the evidence does raise an issue as to whether Rooney is a statutory supervisor because of his involvement in firing an employee and his role in scheduling. However, because the evidence is inadequate to determine his status in this regard, he will also be allowed to vote subject to challenge.

Accordingly, Perez, Chang and Bach will not be excluded from the unit as managerial

employees and/or statutory supervisors. Nor will Chef Tak Wok be excluded given his termination prior to the hearing. Based on the parties' stipulation, Kitchen Manager Quito Karpinski, Manager John Creighton and Bookkeeper Lynn Hartman are excluded from the unit as statutory supervisors and/or managers. Hornsby and Rooney will be allowed to vote subject to challenge.

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